

**COMPREHENSIVE DEVELOPMENT AGREEMENT
FOR THE DESIGN AND FABRICATION OF TOLL BOOTHS
A PROJECT OF THE
TEXAS DEPARTMENT OF TRANSPORTATION**

ISSUED May 14, 2004

**Texas Department of Transportation
1421 Wells Branch Parkway, Suite 107
Pflugerville, Texas 78660**

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COMPREHENSIVE DEVELOPMENT AGREEMENT

Toll Booth Design and Fabrication

This Comprehensive Development Agreement ("Agreement") is entered into by and between the Texas Department of Transportation, a public agency of the State of Texas ("TxDOT"), and _____, a _____ ("Fabricator"), effective as of _____, 2004, as set forth on the signature page hereto, with reference to the definitions contained in Exhibit A hereto and the following facts:

A. TxDOT has selected Fabricator to design, construct and deliver to TxDOT pre-fabricated toll booths (the "Work") for installation on turnpike projects currently under construction and other candidate projects within Austin, Texas and surrounding areas.

B. Pursuant to Chapter 361 of the Texas Transportation Code (the "Act") and Sections 27.1-27.5 of Title 43, Texas Administrative Code (the "Rules"), on May 14, 2004 TxDOT issued a Request for Detailed Proposals ("RFP") and on _____, 2004, received _____ responses. TxDOT determined that Fabricator was the proposer which best met the selection criteria contained in the RFP and that its proposal was the one which provided the best value to the State.

C. The parties intend that compensation for (i) all the Work with respect to the Initial Order of toll booths shall be paid on a lump sum basis, (ii) all Work to deliver any additional toll booths pursuant to the Initial Scope of Work, if any, shall be paid on a lump sum per unit price basis, with such unit prices being subject to escalation. The Agreement is a comprehensive development agreement obligating Fabricator to perform all work necessary to obtain completion of the Work by the deadlines specified herein, for the Prices specified herein, subject only to certain specified limited exceptions.

D. If Fabricator fails to complete the Work in accordance with the time limitations set forth in the Contract Documents, then TxDOT and the members of the public represented by TxDOT will suffer substantial losses and damages. The Contract Documents provide that Fabricator shall pay TxDOT substantial Liquidated Damages if such completion is delayed.

NOW, THEREFORE, in consideration of the sums to be paid to Fabricator by TxDOT, the foregoing premises and the covenants and agreements set forth herein, the parties hereby agree as follows:

Section 1

Contract Components; Interpretation of Contract Documents

1.1 Certain Definitions

Exhibit A hereto contains the meaning of various terms used in the Contract Documents.

1.2 Order of Precedence

The term "Contract Documents" shall mean the documents listed in this Section 1.2. Each of the Contract Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete agreement. In the event of any conflict among the Contract Documents, the order of precedence shall be as set forth below.

- 1.2.1 Change Orders and Agreement amendments;
- 1.2.2 Agreement (including all exhibits and attachments);
- 1.2.3 Specification (Attachment B hereto);
- 1.2.4 Plans (Attachment A hereto)
- 1.2.5 Proposal

In determining whether a conflict exists between the Proposal and other Contract Documents, to the extent that the Proposal can reasonably be interpreted as an offer to provide higher quality items than otherwise required by the Contract Documents or to perform services in addition to those otherwise required, or otherwise contains terms which TxDOT considers to be more advantageous than the requirements of the other Contract Documents, the Proposal shall not be considered in conflict with the other Contract Documents, and Fabricator's obligations hereunder shall include compliance with all such statements, offers and terms.

1.2.6 Additional details and more stringent requirements contained in a lower priority document will control unless the requirements of the lower priority document present an actual conflict with the requirements of the higher level document (i.e. it is not possible to comply with both requirements). Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, in the event of a conflict among any standard or specification applicable to the Work established by reference contained in the Contract Documents to a described publication, TxDOT shall have the right to determine in its sole discretion which provision applies regardless of the order of precedence of the documents in which such standards are referenced. Fabricator shall request TxDOT's determination respecting the order of precedence involving the referenced standards promptly upon becoming aware of any such conflict.

1.3 Interpretation of Contract Documents

Where appropriate, unless otherwise specified, lists contained in the Contract Documents defining the Work shall not be deemed all-inclusive. Fabricator acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the terms and conditions of the Contract Documents and to bring to the attention of TxDOT any conflicts or ambiguities contained therein. Fabricator further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event if an ambiguity in or dispute regarding the interpretation of the Contract Documents, they shall not be interpreted or construed against the Person which prepared them, and instead other rules of interpretation and construction shall be used. On plans, working drawings, and standard plans, calculated dimensions shall take precedence over scaled dimensions.

1.4 Explanations; Omissions and Misdescriptions

Fabricator shall not take advantage of any apparent Error in the Contract Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Fabricator shall apply to TxDOT in writing for such further written explanations as may be necessary and shall conform to the explanation provided. Fabricator shall promptly notify TxDOT of all Errors which it may discover in the Contract Documents, and shall obtain specific instructions in writing regarding any such Error before proceeding with the Work affected thereby. The fact that the Contract Documents omit or misdescribe any details of any Work which are necessary to carry out the intent of the Contract Documents, or which are customarily performed, shall not relieve Fabricator from performing such omitted Work (no matter how extensive) or misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder except as specifically allowed under Section 11.

1.5 Computation of Periods

References to “days” contained in the Contract Documents shall mean calendar days unless otherwise specified; provided that if the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice “within” a specified time period) falls on a non-business day, such act or notice may be timely performed on the next succeeding day which is a business day. The term “business days” shall mean days on which TxDOT is officially open for business.

1.6 Standard for Approvals

In all cases where approvals or consents are required to be provided by TxDOT or Fabricator hereunder, such approvals or consents shall not be withheld unreasonably

except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified the decision shall not be subject to dispute resolution hereunder.

1.7 Design Professional Licensing Requirements

TxDOT does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws, and by execution of the Agreement, Fabricator acknowledges that TxDOT has no such intent. It is the intent of the parties that Fabricator is fully responsible for furnishing the design of the Work through licensed design professionals.

1.8 Federal “Buy America” Requirements

1.8.1 This Agreement is subject to 23 Code of Federal Regulations Section 635.410 Buy America Provisions.

1.8.2 Fabricator’s proposal documents indicate Fabricator’s certification to use only domestic steel and iron. To be considered domestic, all steel and iron used, and all products manufactured from steel and iron, must be produced in the United States, and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied. The requirement does not preclude a minimal use of foreign steel and iron materials, provided the cost of such materials does not exceed 0.1% of the Contract Price.

Section 2

Obligations of Fabricator; Representations, Warranties and Covenants

2.1 Performance Requirements

2.1.1 Performance of Work

All materials, services and efforts necessary to achieve completion of the Work on or before the applicable Delivery Deadline shall be Fabricator’s sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 11 the costs of all such materials, services and efforts are included in the Initial Order Price or Option Order Prices, as appropriate. TxDOT shall have the right to require Fabricator to fabricate and deliver additional toll booths during the Initial Term for the Initial Order Price (per unit, subject to escalation as provided herein) in conformance with the terms of this Agreement, the Specification and any applicable Change Orders. TxDOT shall have the right to require Fabricator to fabricate and deliver additional toll booths during the Option Term for the Option Order Price and in accordance with the Specification determined pursuant to the terms of Section 10.1.2.

2.1.2 Performance Standards

Fabricator shall furnish certain design aspects of the Work and shall fabricate and construct the Work as designed, in accordance with all professional engineering principles, fabrication and construction practices generally accepted as standards of the industry in the State, in a good and workmanlike manner, free from defects (except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents), and in accordance with the terms and conditions set forth in the Contract Documents.

2.2 General Obligations of Fabricator

Fabricator, in addition to performing all other requirements of the Contract Documents, shall:

2.2.1 Furnish all design and other services, provide all materials and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract Documents specify will be undertaken by TxDOT or other Persons) (a) to construct the Work and maintain/store it prior to the applicable Delivery Deadline(s) in accordance with the requirements of the Contract Documents, the Delivery Schedule, the Final Design Documents and all other applicable requirements, so as to achieve the Delivery Deadline(s), (b) to provide such assistance as may be required by TxDOT at the Project Site during installation of the Work after Delivery, and (c) otherwise to do everything required by and in accordance with the Final Design Documents.

2.2.2 At all times provide a Project Manager approved by TxDOT who (a) will have full responsibility for the prosecution of the Work, (b) will act as agent and be a single point of contact in all matters on behalf of Fabricator, (c) and will be available to execute instructions and directions from TxDOT or its authorized representatives.

2.2.3 Use the design firm or firms identified in the Proposal to perform the design services required by the Contract Documents (or other firms approved in writing by TxDOT, which approval shall not be withheld provided that TxDOT shall first have determined that such firm has the demonstrated competence and professional qualifications necessary for the satisfactory performance of the required design services, and that the designated key personnel at such firm have sufficient experience in the requirements applicable to the Work). Fabricator shall not shift design Work from one firm to another without the prior written approval of TxDOT.

2.2.4 Provide such assistance as is reasonably requested by TxDOT in dealing with any Governmental Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Work. Such assistance may include providing information and reports regarding the Work as well as executing declarations and attending meetings and hearings. This provision is not intended to require Fabricator to provide legal services for the benefit of TxDOT.

2.2.5 Comply with, and ensure that all Subcontractors comply with, all requirements of all applicable Governmental Rules, including the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), including any amendments, and the federal Buy America requirements set forth in Section 1.9.

2.2.6 Cooperate with TxDOT in review and oversight of the Work.

2.2.7 Pay all applicable federal, State and local sales, consumer, use and similar taxes, property taxes and any other taxes, fees, charges or levies imposed by a Governmental Person, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work.

2.2.8 Mitigate delay to the Work and mitigate damages due to delay in all circumstances, to the extent possible, including by resequencing, reallocating, or redeploying Fabricator's forces to other work, as appropriate.

2.3 Representations, Warranties and Covenants

Fabricator represents, warrants and covenants that:

2.3.1 Fabricator and its design Subcontractor(s) have maintained, and throughout the Term of the Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work, and shall perform them in accordance with the requirements contained in the Contract Documents.

2.3.2 Fabricator has evaluated the constraints affecting design and fabrication of the Work and has reasonable grounds for believing and does believe that the Work can be designed and built within such constraints.

2.3.3 Fabricator has evaluated the feasibility of performing the Work within the time and for the amount herein, accounting for constraints affecting the design and fabrication of the Work and has reasonable grounds for believing and does believe that such performance (including achievement of Delivery and Final Acceptance by the applicable Delivery Deadline for the Price) is feasible and practicable.

2.3.4 Fabricator acknowledges and agrees that it has familiarized itself with the requirements of any and all applicable Laws and the Rules prior to entering into the Agreement. Except as specifically permitted under Section 11, Fabricator shall be responsible for complying with the foregoing at its sole cost and without any increase in Price or extension of any Delivery Deadline on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents.

2.3.5 Fabricator shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Delivery and Final Acceptance by the applicable Delivery Deadline, including furnishing such employees, materials, facilities and equipment and working such hours, extra shifts, overtime operations, Sundays and

holidays as may be necessary to achieve such goal, all at Fabricator's own cost except as otherwise specifically provided in Section 11.

2.3.6 Fabricator is a _____ duly organized and validly existing under the laws of the State of _____, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Fabricator is duly qualified to do business, and is in good standing, in the State of Texas, and will remain in good standing throughout the Term of the Agreement and for as long thereafter as any obligations remain outstanding under the Contract Documents.

2.3.7 The execution, delivery and performance of the Agreement have been duly authorized by all necessary action of Fabricator and will not result in a breach of or a default under Fabricator's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Fabricator is a party or by which its properties and assets may be bound or affected.

2.3.8 The Agreement constitutes the legal, valid and binding obligation of Fabricator and, if applicable, of each member of Fabricator.

2.4 Performance as Directed

At all times during the Term hereof, including during the course of, and notwithstanding the existence of, any dispute, Fabricator shall perform as directed by TxDOT in a diligent manner and without delay, shall abide by TxDOT's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 16.

Section 3 **Design Requirements; Disclaimer**

3.1 Design Requirements

3.1.1 Design Review Process and Compliance with Final Design Documents

3.1.1.1 Fabricator shall submit its design and shop fabrication plans, drawings and related documents or data to TxDOT, for review and approval as set forth in Specification Section 5. The TxDOT-approved submittals shall collectively be deemed the Final Design Documents.

3.1.1.2 Fabricator shall respond to the comments and make modifications to the design and shop fabrication plans, drawings and related documents and data based on the comments in accordance with Specification Section 5. Fabricator acknowledges that comments may be provided which reflect concerns regarding operability or preferences of the commenter or which otherwise do not directly relate to specific requirements of the Contract Documents. Fabricator agrees to

undertake reasonable efforts to accommodate or otherwise resolve any such comments through the review process described in Specification Section 5. The foregoing shall in no way be deemed to obligate Fabricator to incorporate any comments that would result in a significant disruption to its schedule or a significant increase in its costs, except pursuant to a TxDOT-Directed Change.

3.1.1.3 Fabricator shall perform the Work in accordance with the Final Design Documents. The Final Design Documents may be changed only with prior written approval of TxDOT.

3.2 Responsibility for Design

3.2.1 Fabricator Responsibility

Fabricator agrees that it has responsibility to perform certain portions of the design of the Work and that Fabricator will furnish the design of that Work in a manner that is in conformance with the Plans and the Specification.

3.2.1.1 Fabricator is not entitled to rely on (i) the Plans, or (ii) any other documents or information provided by TxDOT, except to the extent specifically permitted in the Contract Documents.

3.2.1.2 Fabricator is responsible for correcting any Errors in the Plans through the design and/or fabrication process without any increase in the Price or extension of the Delivery Deadline, subject only to the right to a Change Order to the extent permitted by Section 11.

3.2.1.3 Fabricator's warranties and indemnities hereunder cover Errors in the Work even though they may be related to Errors in the Plans.

3.2.1.4 Fabricator is responsible for verifying all calculations and quantity takeoffs contained in the RFP Documents or otherwise provided by TxDOT.

3.2.2 Plans

Fabricator acknowledges and agrees that if Fabricator wishes to deviate from the concepts contained in the Plans, it must specifically identify such deviations in writing to TxDOT, provide justification for the modification, and obtain specific written approval from TxDOT prior to use of such modifications. Fabricator acknowledges and agrees that constraints set forth in the Contract Documents, as well as Project Site conditions, will impact Fabricator's ability to revise the concepts contained in the Plans, in addition to the requirement to obtain approval.

3.3 Disclaimer

3.3.1 Fabricator understands and agrees that TxDOT shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Fabricator-Related Entity by reason of any use of

any information contained in the Plans or any action or forbearance in reliance thereon, except to the extent that TxDOT has specifically agreed herein that Fabricator shall be entitled to an increase in the Price and/or extension of the Delivery Deadline with respect to such matter. Fabricator further acknowledges and agrees that (a) if and to the extent Fabricator or anyone on Fabricator's behalf uses any of said information in any way, such use is made on the basis that Fabricator, not TxDOT, has approved and is responsible for said information, and (b) Fabricator is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to verify or supplement said information, and that any use of said information is entirely at Fabricator's own risk and at its own discretion.

3.3.2 TxDOT DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE PLANS IS EITHER COMPLETE OR ACCURATE OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF THE CONTRACT DOCUMENTS. TxDOT DOES NOT REPRESENT OR WARRANT THE ACCURACY OR COMPLETENESS OF ANY ITEMIZED LIST SET FORTH IN THE SPECIFICATION. THE FOREGOING SHALL IN NO WAY AFFECT TxDOT'S LIABILITY FOR NECESSARY CHANGE ORDERS IN ACCORDANCE WITH SECTION 11.

Section 4

Time Within Which Work Shall be Completed and Delivered

4.1 Time of Essence; Notice to Proceed

4.1.1 Time is of the essence of this Agreement.

4.1.2 Authorization allowing Fabricator to proceed with Work hereunder shall be provided through a Notice to Proceed (NTP) issued by TxDOT.

4.2 Delivery Deadlines

4.2.1 Initial Order Delivery Deadline

Fabricator shall deliver the Initial Order to TxDOT on the date(s) specified in the Delivery Schedule provided in Exhibit B, except to the extent specified below, and Fabricator shall deliver any additional orders made by TxDOT within the Initial Term on or before the date(s) specified by TxDOT in such orders, which shall be not less than 180 days from the date of each such order. The toll booth frames for the Initial Order shall be delivered to TxDOT for installation at the designated Project Sites on the dates specified in the Delivery Schedule, and toll booth frames for additional orders shall be delivered to TxDOT for installation at the designated Project Sites at least 120 Days prior to the Delivery Deadline for such additional toll booths. Each of said dates for achieving Delivery, as they may be extended hereunder, are referred to herein respectively as the "Delivery Deadline."

4.2.2 Option Order Delivery Deadline

The Delivery Deadline for Option Orders placed by TxDOT, if any, shall be negotiated and agreed upon by the Parties prior to the expiration of the Initial Term by amendment to this Agreement, as provided in Section 10.1.2.

4.2.3 No Time Extensions; Acceleration

Except as otherwise specifically provided in Section 11, TxDOT shall have no obligation to extend the Delivery Deadline and Fabricator shall not be relieved of its obligation to comply with the Delivery Deadline and to achieve Final Acceptance for any reason. TxDOT shall have the right to accelerate the Delivery Deadline in order to correspond to anticipated early completion of any road segment by TxDOT's construction contractor(s), subject to the Change Order provisions set forth in Section 11.

4.3 Project Schedule

The design portion of the Work and fabrication of a prototype shall be undertaken and completed by Fabricator in accordance with the Specification. Fabricator shall prepare a detailed schedule ("Project Schedule") of the design portion of the Work, fabrication of a prototype, toll booth completion and delivery of toll booths to be reviewed and approved by TxDOT in accordance with the Specification. The Project Schedule shall be the Fabricator's detailed plan for all Work from issuance of the NTP through Final Acceptance, as described in the Contract Documents. The Project Schedule shall utilize the critical path method for the planning, scheduling and reporting of the Work performed under the Agreement. The Project Schedule shall be updated monthly and submitted to TxDOT in both electronic and hard copy formats.

Section 5 **Control of Work**

5.1 Control and Coordination of Work

Fabricator shall be solely responsible for and have control over the fabrication means, methods, techniques, sequences, procedures and site safety, and shall be solely responsible for coordinating all portions of the Work under the Contract Documents, subject, however, to all requirements contained in the Contract Documents.

5.2 Safety

Fabricator shall take all reasonable precautions and be solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons who would reasonably be expected to be affected by the Work, including individuals performing the Work, employees of TxDOT and its consultants inspecting and/or installing the Work, and members of the public who may be affected by the Work.

5.3 Inspection and Testing

5.3.1 Fabricator Inspection and Testing

Fabricator shall perform the inspection, sampling and testing necessary for Fabricator to comply with its obligations under the Contract Documents.

5.3.2 Oversight and Inspection and Testing by TxDOT

TxDOT has the right, in its sole discretion, to conduct reviews of the toll booths at any time during the fabrication. TxDOT shall have the right to perform an inspection in the “final” stage, as set forth in the Specification, Section 1.4.F, for purposes of determining any Errors in the booths prior to Delivery.

5.4 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances and Approvals

5.4.1 Oversight and Acceptance

The oversight, spot checks, audits, tests, acceptances and approvals conducted by or on behalf of TxDOT do not constitute acceptance of the materials or Work inspected or waiver of any warranty or legal or equitable right with respect thereto. TxDOT may request remedies for Nonconforming Work and/or identify additional Work which must be done to bring the Work into compliance with contract requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, tests, acceptances or approvals were conducted or waived by TxDOT.

5.4.2 No Estoppel

Fabricator shall not be relieved of obligations to perform the Work in accordance with the Contract Documents, or any of its Warranty or indemnity obligations, as the result of oversight, spot checks, audits, reviews, tests or inspections performed by any Persons, approvals or acceptances made by any Persons, or any failure of any Person to take such action. TxDOT shall not be precluded or estopped, by any measurement, estimate or certificate made either before or after Final Acceptance, or by making any payment, from showing that any such measurement, estimate or certificate is incorrectly made or untrue, or from showing the true amount and character of the work performed and materials furnished by Fabricator, or from showing that the work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate or certificate, or payment made in accordance therewith, TxDOT shall not be precluded or estopped from recovering from Fabricator and its Surety(ies) such damages as TxDOT may sustain by reason of Fabricator's failure to comply or to have complied with the terms of the Contract Documents.

5.5 Nonconforming Work

5.5.1 Rejection, Removal and Replacement of Work

If Fabricator fails to correct any Nonconforming Work within ten days of receipt of notice from TxDOT requesting correction, or if such Nonconforming Work cannot be corrected within ten days, and Fabricator fails to (a) provide to TxDOT a schedule for correcting any such Nonconforming work acceptable to TxDOT within such ten-day period, (b) commence such corrective Work within such ten-day period and (c) thereafter diligently prosecute such correction in accordance with such approved schedule to completion, then TxDOT may cause the Nonconforming Work to be remedied or replaced and may deduct the cost of doing so from any moneys due or to become due Fabricator and/or obtain reimbursement from Fabricator for such cost.

5.5.2 Agreement to Accept Nonconforming Work

If TxDOT agrees to accept any Nonconforming Work without requiring it to be fully corrected, TxDOT shall be entitled to reimbursement of a portion of the Price in an amount equal to the greatest of (a) the amount deemed appropriate by TxDOT to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work, (b) the amount of the Price allocated to such Work, or (c) 100% of Fabricator's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents. Such reimbursement shall be payable to TxDOT within ten days after Fabricator's receipt of an invoice therefor. Fabricator acknowledges and agrees that TxDOT shall have sole discretion regarding acceptance or rejection of Nonconforming Work and shall have sole discretion with regard to the amount payable in connection therewith.

Section 6

Small Business Enterprise; Civil Rights; Subcontractors

6.1 SBE Requirements

6.1.1 TxDOT's Small Business Enterprise (SBE) Program requirements applicable to the Work are set forth in Exhibit C. The purpose of the SBE Program is to ensure that SBEs shall have an equal opportunity to participate in the business of TxDOT as service providers, vendors, subcontractors, advisors and consultants. The SBE participation goal for the Work is 10% for all Work. Fabricator shall comply with all requirements set forth in Exhibit C.

6.1.2 Fabricator shall include provisions to effectuate the SBE Program and Exhibit C in every Subcontract (including purchase orders and in every subcontract of any Fabricator-Related Entity for Work), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

6.2 Civil Rights; Equal Employment Opportunity

6.2.1 Fabricator shall not, and shall cause the Subcontractors to not, discriminate on the basis of race, color, national origin or sex in the performance of the Work under the Contract Documents. Failure by Fabricator to carry out these requirements is a material breach of this Agreement, which may result in the termination of the Contract Documents or such other remedy as TxDOT deems appropriate.

6.2.2 Fabricator shall include Section 6.2.1 in every Subcontract (including purchase orders), and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

6.2.3 Fabricator confirms for itself and all Subcontractors that Fabricator and each Subcontractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that Fabricator and each Subcontractor maintains no employee facilities segregated on the basis of race, color, religion or national origin. Fabricator shall comply with all applicable Equal Employment Opportunity and nondiscrimination Laws.

6.3 Subcontracts

6.3.1 Each instrument evidencing any agreement of Fabricator with any Subcontractor shall provide, in terms and in form and substance satisfactory to TxDOT that: (a) the rights of Fabricator under such instrument are assigned to TxDOT contingent only upon delivery of written request from TxDOT or its successor or assign following default by Fabricator or termination or expiration of this Agreement; and (b) all warranties (express and implied) of such Subcontract shall inure to the benefit of TxDOT.

6.3.2 Fabricator shall deliver to TxDOT, within ten days after receipt of a request from TxDOT, copies of all subcontracts and other documents as may be requested. Nothing in this Agreement will create any contractual relationship between TxDOT and any Subcontractor of Fabricator.

6.3.3 The following requirements shall apply to Subcontracts:

6.3.3.1 Each Subcontract shall include terms and conditions sufficient to ensure compliance by the Subcontractor with the requirements of the Contract Documents, and shall include those terms that are specifically required by the Contract Documents to be included therein. All Subcontracts, including Subcontracts with Suppliers, shall incorporate terms substantially similar to those contained in this Agreement, specifically including an agreement by the Subcontractor to participate in any dispute review proceeding pursuant to Section 16, if such participation is requested by either TxDOT or Fabricator.

6.3.3.2 Once Fabricator has entered into a Subcontract with a Major Subcontractor, Developer shall not have the right to make any substitution of such Subcontractor except with the TTA's prior written approval.

6.4 Project Manager

The Proposal identifies Fabricator's Project Manager. Fabricator shall not remove or replace the Project Manager without the prior written consent of TxDOT.

Section 7 **Bonds and Insurance**

7.1 Provision of Bonds

Prior to execution of this Agreement, Fabricator has provided payment and performance bonds to TxDOT securing Fabricator's obligations hereunder, each in an amount equal to \$3,000,000, and Fabricator shall maintain such bonds in full force and effect as described below, subject to replacement by a Warranty Bond as provided below.

7.1.1 A copy of the form of Performance Bond previously provided is attached hereto as Exhibit D. TxDOT will release the Performance Bond upon expiration of the Warranty term provided that no outstanding claims are then pending against Fabricator hereunder.

7.1.2 A copy of the Payment Bond previously provided is attached hereto as Exhibit E. TxDOT will release the Payment Bond (a) upon receipt of (i) evidence satisfactory to TxDOT that all Persons eligible to file a claim against the bond have been fully paid and (ii) unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the bond and (b) upon expiration of the statutory period for Subcontractors to file a claim against the bond if no claims have been filed.

7.1.3 Each bond required hereunder shall be issued by a Surety authorized to do business in the State with a rating of Baa1 by Moody's Investors Services or BBB+ by Standard & Poors Corporation or better, or as otherwise approved by TxDOT in its sole discretion. If any bond previously provided becomes ineffective, or if the surety that provided the bond no longer meets the requirements hereof, Fabricator shall provide a replacement bond in the same form issued by a surety meeting the foregoing requirements, or other assurance satisfactory to TxDOT in its sole discretion. If TxDOT places additional orders for toll booths, Fabricator shall either provide a corresponding proportionate increase in the amount of each bond, or shall provide separate bonds in the amount of 100% of the value of fabrication Work for such additional toll booths or such lesser amount as is approved by TxDOT, in its sole discretion. If the Price is increased in connection with a Change Order, TxDOT may, in its sole discretion, require a corresponding proportionate increase in the amount of each bond or alternative security.

7.1.4 After Final Acceptance of the Initial Order, and after Final Acceptance of each additional order, Fabricator may obtain a release of the Performance and Payment Bonds for the Initial Order or additional orders, as the case may be, by providing a warranty bond which shall guarantee performance of the Work required to be performed during the Warranty period for the Initial Order, and each additional order, respectively, and which shall also constitute a payment bond guaranteeing payment to Persons performing such work, and shall guaranty due and punctual performance of all obligations of Fabricator under the Contract which survive Final Acceptance ("Warranty Bond"). The Warranty Bond shall be in the amount of five percent (5%) of the Price for the relevant order and shall be in a form acceptable to TxDOT in its sole discretion. Initially, the Warranty Bond shall apply to the Initial Order. Upon Final Acceptance of additional orders, Fabricator may provide a rider to the Warranty Bond adding the additional order to the scope of the Warranty Bond, provided that the penal sum of the Bond shall be increased by an amount equal to five percent (5%) of the Price for such additional order.

7.2 Insurance

Fabricator shall purchase and continuously maintain in full force and effect the insurance coverages and limits specified in Exhibit F. The insurance provided hereunder shall be available for the benefit of TxDOT and Fabricator with respect to covered claims, but shall not be interpreted to relieve Fabricator of any obligations hereunder. All insurance required hereunder shall be procured from insurance or indemnity companies with an A.M. Best and Company rating level of A- or better, Class VIII or better, or as otherwise approved by TxDOT and authorized or approved to do business in the State. All limits of liability set forth in Exhibit F are in U.S. dollars.

7.3 No Relief of Liability

Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety or Insurer of any of the obligations of Fabricator shall not relieve Fabricator of any of its obligations hereunder.

Section 8 **Title, Storage, Handling**

Fabricator warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Work, free and clear of all Liens. Title to all of such materials, equipment, tools and supplies shall pass to TxDOT free and clear of all Liens, upon the sooner of (a) acceptance by TxDOT as evidenced by incorporation into a Project Site, or (b) Payment by TxDOT to Fabricator pertaining thereto. Notwithstanding any such passage of title, Fabricator shall retain sole care, custody and control of the finished toll booths (and risk of loss with respect thereto) and shall exercise due care with respect thereto until Delivery is made.

8.1 Storage and Handling

Fabricator shall store all toll booth units at the bonded warehouse and/or fabrication site until Delivery to TxDOT. Fabricator shall provide appropriate security for the storage site, as set forth in the Specification, Section 7, and shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to the Work.

Section 9 Warranties

9.1 Warranties

9.1.1 Warranty

Fabricator warrants that (a) all design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State, (b) the Work shall be free of defects, including design Errors, except to the extent that such defects are inherent in prescriptive specifications included in the Contract Documents, (c) the Work shall be fit for use for the intended function, (d) materials and equipment furnished for the Work and under the Contract Documents shall be of good quality and new, and (e) the Work shall meet all of the requirements of the Contract Documents.

9.1.2 Warranty Term

The Warranty term for each toll booth unit of the Work shall commence upon Final Acceptance thereof by TxDOT. Subject to extension under Section 9.2, the Warranties regarding all elements of the Work shall remain in effect until two years after the Final Acceptance Date, except that (a) special warranty requirements shall apply with respect to the rooftop HVAC unit in accordance with Specification Section 1.8, (b) a five-year extended parts warranty shall apply with respect to the compressor in accordance with Specification Section 1.8, and (c) Fabricator shall warrant that toll booth roofs shall not leak for a period of 10 years. TxDOT and Fabricator shall conduct an inspection of each toll booth unit prior to expiration of the two-year mark in the general Warranty period and shall produce a punch list of those items requiring Warranty Work.

9.1.3 Remedy

Within seven days of receipt by Fabricator of notice from TxDOT specifying a failure of any of the Work to satisfy Fabricator's Warranties, or of any Subcontractor representation, warranty, guarantee or obligation which Fabricator is responsible to enforce, Fabricator and TxDOT shall mutually agree when and how Fabricator shall remedy such violation. Fabricator and TxDOT shall promptly meet in order to agree on a remedy. If Fabricator does not use its best efforts to proceed to effectuate such remedy within the agreed time, or should Fabricator and TxDOT fail to reach such an agreement within such seven-day period (or immediately in the case of emergency conditions), TxDOT, after notice to Fabricator, shall have the right to

perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Fabricator. TxDOT may agree to accept Nonconforming Work in accordance with Section 5.5.2.

9.2 Applicability of Warranties to Re-Done Work

The Warranties shall apply to all Work re-done, repaired, corrected or replaced pursuant to the terms of the Agreement. The Warranties as to each re-done, repaired, corrected or replaced element of the Work shall extend beyond the original warranty period if necessary to provide at least a one year warranty period regarding all elements of the re-done, repaired, corrected or replaced Work.

9.3 Subcontractor Warranties

9.3.1 Warranty Requirements

Without in any way derogating the Warranties and Fabricator's own representations and warranties and other obligations with respect to all of the Work, Fabricator shall obtain from all Subcontractors and cause to be extended to TxDOT appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors. All representations, warranties, guarantees and obligations of Subcontractors (a) shall be written so as to survive all TxDOT inspections, tests and approvals, and (b) shall run directly to and be enforceable by Fabricator and/or TxDOT and their respective successors and assigns. Fabricator hereby assigns to TxDOT all of Fabricator's rights and interest in all extended warranties for periods exceeding the applicable warranty period which are received by Fabricator from any of its Subcontractors.

9.3.2 Enforcement

Upon receipt from TxDOT of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, Fabricator shall enforce or perform any such representation, warranty, guaranty or obligation, in addition to Fabricator's other obligations hereunder. TxDOT's rights under this Section 9.3.2 shall commence at the time such representation, warranty, guaranty or obligation is furnished and shall continue until the expiration of Fabricator's relevant warranty (including extensions thereof under Section 9.2). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Fabricator if such cost is covered by such a warranty and Fabricator shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors.

9.4 No Limitation of Liability

The foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit Fabricator's liability or responsibility imposed by the Contract Documents

or applicable law with respect to the Work, including liability for design defects, latent fabrication defects, strict liability, negligence or fraud; provided, however, that upon expiration of the Warranties, Fabricator shall have no further liability hereunder for patent fabrication defects.

9.5 Damages for Breach of Warranty

Subject to Section 14.3 and in addition to TxDOT's other rights and remedies hereunder, at law or in equity, Fabricator shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work.

9.6 Warranty Disputes

Any disagreement between TxDOT and Fabricator relating to this Section 9 shall be subject to dispute resolution in accordance with Section 16.

Section 10

Payment for Services

10.1 Price

10.1.1 Initial Order Price

As full compensation for the Initial Order and all related obligations to be performed by Fabricator under the Contract Documents, TxDOT shall pay to Fabricator the lump sum amount of \$_____ (the "Initial Order Price"), which equates to (a) a unit price of \$_____ for mainline toll booths for the Initial Order (the "Initial Per Mainline Unit Price"), plus (b) a unit price of \$_____ for mainline toll booth frames for the Initial Order ("Initial Mainline Frame Unit Price"), plus (c) a unit price of \$_____ for ramp toll booths for the Initial Order ("the "Initial Per Ramp Unit Price"), plus (d) a unit price of \$_____ for ramp toll booth frames for the Initial Order ("Initial Ramp Frame Unit Price"), plus (e) a unit price of \$_____ for ramp toll booth ACM Platforms (the "Initial Ramp Toll Booth ACM Platform Unit Price"), plus the amount of \$_____ ("Design/ Mobilization Costs"). The Initial Order Price (and the Initial Per Unit Prices) shall be increased or decreased only by a Change Order issued in accordance with Section 11 or by an Agreement amendment. During the Initial Term, the per unit price for any additional orders placed by TxDOT shall remain the same as the Initial Per Mainline Unit Price and Initial Mainline Frame Unit Price for mainline toll booths and the Initial Per Ramp Unit Price, Initial Ramp Toll Booth ACM Platform Unit Price, and Initial Ramp Frame Unit Price for ramp toll booths, subject to (a) escalation and (b) adjustment for steel materials as follows:

10.1.1.1 For any additional orders placed by TxDOT during the second through fifth years of the Initial Term, the per unit price shall be based on the change in the one-year rolling average of the monthly Construction Cost Index, by adding the product of the following to the Initial Per Unit Prices less the price for any stainless steel materials:

$$\Delta = (\text{Initial Per Unit Price}) * (A-B)/B$$

where:

" Δ " is the adjustment amount;

"A" is the average of the ENR Construction Cost Index (CCI) published during the 12-month period preceding the effective date of the NTP for such additional order (i.e., the amount determined by taking the average of the index most recently published as of the date of the NTP, the index most recently published as of the date one month prior to that date, etc.); and

"B" is the average of the CCI during the 12-month period preceding the date of the NTP for the Initial Order.

For example, if the NTP Date for the Initial Order is August 1, 2004, the date for commencement of escalation would be August 1, 2005. Assuming (a) the as-proposed Per Unit Price is \$100, (c) the average monthly CCI for the one-year period ending on the effective date of the additional order NTP was 7875, and (d) the average monthly CCI for the one-year period ending on August 1, 2004 was 7500, then the price adjustment amount would be:

$$\Delta = \$100 \times (7875-7500)/7500 = \$5$$

Accordingly, the Initial Per Unit Price of \$100 would be increased to \$105 for the additional order as a result of the increase in the CCI. Notwithstanding the foregoing, if A minus B is a negative number, no adjustment shall be made.

10.1.1.2 For any additional orders placed by TxDOT during the second through fifth years of the Initial Term, the per unit price shall be subject to adjustment for fluctuations in the price of steel in accordance with Exhibit G.

10.1.2 Option Order Price

TxDOT shall notify Fabricator of TxDOT's desire to exercise its option to enter into an amendment to this Agreement establishing the Option Order Price and the Specification for Option Orders not fewer than 30 days prior to expiration of the Initial Term. The parties shall enter into such CDA amendment as is necessary to reflect the agreed upon Option Order Price and Specification for Option Orders prior to expiration of the Initial Term, provided that if TxDOT has provided such notice to Fabricator and the Initial Term expires prior to the parties entering into such amendment, the parties shall continue to negotiate in good faith. If, at the conclusion of the good faith negotiations, the parties have not yet agreed upon the terms of the amendment and TxDOT desires to place an Option Order, TxDOT shall have the right to direct Fabricator to provide Option Orders on a Force Account basis in accordance with the Specification and schedule provided by TxDOT. Except as set forth in the foregoing sentence, the Option Order Price for Option Orders placed by TxDOT, if any,

shall be negotiated and agreed upon by the parties based upon Fabricator's projected costs given the nature of the Work, changes in the Specification and market conditions. The Option Order Price established by amendment shall remain constant for the Option Term. In the event of Option Orders, an amended Specification shall be agreed upon by the Parties which sets forth the delivery schedule for the Option Orders, any design modifications from the Initial Scope of Work, and any other applicable modifications to the Work.

10.1.3 Items Included in Price

Fabricator acknowledges and agrees that, subject only to Fabricator's rights under Section 11, the Initial Order Price (and the per unit price for additional orders during the Initial Term) and/or the Option Order Price, as the case may be, includes (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Fabricator's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) payment of any taxes, duties, permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; (d) payment of all shipping costs; and (e) compensation for all risks and contingencies assigned to Fabricator under the Contract Documents.

10.2 Payment

Payment for all Work will be made as follows:

10.2.1 The first payment shall be in the amount of \$_____ [from *Proposal; not to exceed 10% of the Initial Order Price*] for Design/ Mobilization Costs, payable when all shop drawings for ramp and mainline booths have been approved by TxDOT. TxDOT shall not unreasonably withhold such approval.

10.2.2 Payment up to 90% of the Initial Per Mainline Unit Price shall be made for each mainline toll booth upon Fabricator's certification that such mainline toll booth is complete, shrink wrapped and ready for shipment pursuant to the Specification. Payment of 90% of the Initial Per Ramp Unit Price shall be made for each ramp toll booth upon Fabricator's certification that such ramp toll booth is complete, shrink wrapped and ready for shipment pursuant to the Specification.

Payment shall be subject to inspection of the Work by TxDOT or its designee and verification that the invoiced toll booths have been completed and stored in compliance with the Contract Documents.

10.2.3 The Initial Mainline Frame Unit Price for each mainline toll booth frame shall be payable upon Delivery of such mainline toll booth frame, and the Initial Ramp Frame Unit Price for each ramp toll booth frame shall be payable upon Delivery of such ramp toll booth frame.

10.2.4 The Initial Ramp Toll Booth ACM Platform Unit Price for each ramp toll booth ACM Platform shall be payable upon Delivery of such ramp toll booth ACM platform.

10.2.5 The final payment shall be in the amount of up to 100% of the Initial Order Price less previous amounts paid, payable on or about the date of Final Acceptance of the Initial Order.

10.2.6 Payment for additional orders during the Initial Term shall be made as described above, provided that the price for each additional order shall be the Initial Per Mainline Unit Price multiplied by the number of mainline toll booths and the Initial Per Ramp Unit Price multiplied by number of ramp toll booths in the additional order, as such price may be adjusted in accordance with Section 10.1.1. Payment for Option Orders shall be made as described above, provided that the applicable price shall be the Option Order Price.

10.3 Invoicing

10.3.1 Delivery of Draw Requests

For each of the amounts described in Section 10.2 that becomes payable, Fabricator shall deliver to TxDOT five copies of a Draw Request in a form acceptable to TxDOT and meeting all requirements specified herein except as otherwise approved in writing by TxDOT. Each Draw Request shall be executed by a designated and authorized representative of Fabricator appointed by Fabricator to have such authority in accordance with this Agreement. Draw requests shall be submitted on the 5th business day of each month for amounts due with respect to the immediately preceding month. No more than one Draw Request may be submitted for each calendar month.

10.3.2 Contents of Draw Requests

Each Draw Request must contain the following items:

(a) Draw Request cover sheet, including Project number and title, total amount earned to date for the Project, and authorized signature, title of signer, and date of signature;

(b) A Progress Report as described in Section 10.3.4;

(c) Certification by the Fabricator that all Work which is the subject of the Draw Request fully complies with the requirements of the Contract Documents subject to any exceptions identified in the certification;

(d) Report of personnel hours by month;

(e) Supporting documents, as required by TxDOT to support and substantiate the amount requested (based on quantities and unit prices for unit priced

Work, based on time and materials for Time and Materials Change Orders, and based on the Project Schedule for all other Work);

(f) An approved and updated Project Schedule; and

(g) Such other items as TxDOT reasonably requests.

In addition, no Draw Request shall be considered complete unless it: (1) describes in detail the status of completion as it relates to the Project Schedule; (2) in the case of amounts to be paid on a unit price basis, includes photographs, serial numbers, invoices, receipts or other evidence establishing the number of units completed; (3) in the case of amounts invoiced on a time and materials basis, includes all supporting documentation described in Section 11; and (4) sets forth in detail the amounts paid to Subcontractors (including Suppliers and sub-subcontractors) from the payments previously made by TxDOT to Fabricator with respect to the prior Draw Request, including executed unconditional waivers of claims with respect to all amounts so paid.

10.3.3 Payment by TxDOT

Within ten business days after TxDOT's receipt of a complete Draw Request, TxDOT will review the Draw Request and all attachments and certificates thereto for conformity with the requirements of the Contract Documents, and shall notify Fabricator of the amount approved for payment and the reason for disapproval of any remaining invoiced amounts or of any other information set forth in the Draw Request. Fabricator may include such disapproved amounts in a supplemental Draw Request after correction of the deficiencies noted by TxDOT and satisfaction of the requirements of the Contract Documents related thereto. Within five business days after TxDOT's approval of a Draw Request, TxDOT shall pay Fabricator the amount of the Draw Request approved for payment less any amounts which TxDOT is entitled to withhold or deduct. In no event shall Fabricator be entitled to (a) payment for any activity in excess of the value of the activity times the completion percentage of such activity, or (b) aggregate payments hereunder in excess of the overall completion percentage for the Project times the Initial Order Price.

10.3.4 Progress Reports

Fabricator shall report monthly on the status of the Work. Monthly progress reports shall be submitted on the 5th business day of each month for the immediately preceding month, shall be in a form approved by TxDOT, shall be certified as true and correct by an authorized representative of Fabricator, and shall report on the following matters:

(a) Progress in completing design and approval of shop drawings as compared with Fabrication Schedule;

(b) Status of completion and approval of 50% and 90% mockups of toll booths;

(c) Current completion and delivery schedule as compared with approved Fabrication Schedule;

(d) Current inventory of "Material on Hand" and location of each such unit, including costs incurred per unit and supporting documents and invoices;

(e) Inventory of units that have been delivered to the Project Site;

(e) Installation progress and issues identified during installation;

(f) Effective Warranty dates;

(g) Other information reasonably requested by TxDOT;

(h) SBE utilization report in a format reasonably acceptable to TxDOT;

(i) Certification that Work performed complies with the Contract Documents and all QC/QA procedures have been followed; and

(h) Other information that Fabricator wishes to bring to the attention of TxDOT.

10.4 Deductions, Exclusions and Limitations on Payment

10.4.1 Deductions

TxDOT may deduct from each progress payment and the Final Payment the following:

(a) Any TxDOT or third party Losses for which Fabricator is responsible hereunder or any Liquidated Damages which have accrued as of the date of the application for payment or which are anticipated to accrue based on the completion date shown in the current Project Schedule;

(b) If a notice to stop payment, claim or Lien is filed with TxDOT, due to the Fabricator's failure to pay for labor or materials used in the work, money due for such labor or materials will be withheld from payment to the Fabricator;

(c) Any sums expended by TxDOT in performing any of Fabricator's obligations under this Agreement which Fabricator has failed to perform, and

(d) Any other sums which TxDOT is entitled to recover from Fabricator under the terms of this Agreement.

The failure by TxDOT to deduct any of these sums from a payment shall not constitute a waiver of TxDOT's right to such sums.

All amounts owing by Fabricator to TxDOT under this Agreement shall earn interest from the date on which such amount is owing at the lesser of (i) 12% per annum or (ii) the maximum rate allowable under applicable Governmental Rules.

10.4.2 Unincorporated Materials

TxDOT will not pay for materials not yet incorporated in the Work.

10.5 Final Payment

Final Payment for all Work will be made as follows:

10.5.1 On or about the date of Final Acceptance of the Initial Order, and on or about the date of Final Acceptance of any additional orders (including Option Orders), Fabricator shall prepare and submit a proposed payment request to TxDOT showing the proposed total amount due Fabricator, including any amounts owing from Change Orders. The payment request shall be accompanied by (a) evidence regarding the status of all existing or threatened claims, Liens and stop notices of Subcontractors or laborers, against Fabricator, (b) consent of any Surety to Payment, (c) such other documentation as TxDOT may reasonably require; and (d) the release described in Section 10.5.4, executed by Fabricator.

10.5.2 If the payment request shows no existing or threatened claims, Liens and stop notices of Subcontractors or laborers, against Fabricator or against TxDOT, and provided the payment request has been approved, TxDOT, in exchange for an executed release meeting the requirements of Section 10.5.4 and otherwise satisfactory in form and content to TxDOT, will pay the entire sum found due on the approved payment request, less the amount of any Losses that have accrued as of the date of the Payment.

10.5.3 If the payment request lists any existing or threatened claims, Liens and stop notices of Subcontractors or laborers against Fabricator, or if any is thereafter filed, TxDOT may withhold from the Payment of the amounts set forth on the approved payment request such amount as TxDOT deems advisable to cover any amounts owing to TxDOT by Fabricator and the amount of any existing or threatened claims, Liens and stop notices of Subcontractors or laborers against Fabricator.

10.5.4 The executed release from Fabricator shall be from any and all claims arising from the Work, and shall release and waive any claims against the Indemnified Parties. The release shall be accompanied by an affidavit from Fabricator certifying that:

10.5.4.1 All Work has been performed in strict accordance with the requirements of the Contract Documents;

10.5.4.2 Fabricator has resolved any claims made by Subcontractors and others against Fabricator or the Work;

10.5.4.3 Fabricator has no reason to believe that any Person has a valid claim against Fabricator or the Work which has not been communicated in writing by Fabricator to TxDOT as of the date of the certificate; and

10.5.4.4 All guarantees, Warranties and the Payment Bond and the Performance Bond are in full force and effect. Said release and the affidavit shall survive Final Payment.

10.5.5 TxDOT will review Fabricator's proposed payment request, and changes or corrections will be forwarded to Fabricator for correction within 10 Business Days. TxDOT shall pay any undisputed amounts, less any Losses that have accrued as of the date of the Payment, within 20 Days after its approval of such amounts on the application for Payment, but not earlier than the date of Final Acceptance. If no changes or corrections are required, TxDOT will accept the payment request and make such payment within 30 days after its acceptance thereof.

10.6 Payment to Subcontractors

10.6.1 No later than ten days after receipt of Payment from TxDOT, Fabricator shall promptly pay each Subcontractor, out of the amount paid to Fabricator on account of such Subcontractor's portion of the Work, the amount to which such Subcontractor is entitled, less any retainage provided for in the Subcontract and any other offsets and deductions provided in the Subcontract or by law. Upon satisfactory completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with all applicable requirements of the Contract Documents, Fabricator shall return all moneys withheld in retention from the Subcontractor. Such payment shall be made promptly following satisfaction of the foregoing requirements, even if Work to be performed by Fabricator or other Subcontractors is not completed and has not been accepted, provided that release of the Subcontract retention shall be made on or before the later to occur of (a) ten days following satisfaction of the foregoing requirements or (b) ten days following receipt of payment from TxDOT for the completed Subcontract Work. Each Subcontract shall require the Subcontractor to make payments to sub-subcontractors and Suppliers in a similar manner.

10.6.2 For the purpose of this Section 10.6, satisfactory completion shall have been accomplished when:

10.6.2.1 The Subcontractor has fulfilled the Subcontract requirements and the requirements under the Contract Documents for the subcontracted Work, including the submission of all submittals required by the Subcontract and Contract Documents; and

10.6.2.2 The Work performed by the Subcontractor has been inspected and approved in accordance with the Contract Documents and the final quantities of the Subcontractor's work have been determined and agreed upon.

10.6.3 The inspection and approval of a Subcontractor's work does not eliminate or impair the Fabricator's responsibility for the Work under this Agreement. Any delay or postponement of payments to Subcontractors from the above-referenced time frames may occur only for good cause following written approval by TxDOT. Fabricator shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to sub-subcontractors in a similar manner. TxDOT shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law. Interest on late payments to Subcontractors shall be Fabricator's responsibility, and shall not be a part of the Price.

10.7 Disputes

Any dispute regarding Payment shall be resolved pursuant to Section 16. Fabricator shall proceed with any remaining Work obligations, including Warranty Work, as directed by TxDOT pending resolution of the dispute. Upon resolution of any such dispute, each party shall promptly pay to other any amount owing.

Section 11 **Changes in the Work**

This Section 11 sets forth the requirements for obtaining all Change Orders under the Agreement. Fabricator hereby acknowledges and agrees that the Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Section 11 and that TxDOT is subject to constraints limiting its ability to increase the Price or extend the Delivery Deadline. Fabricator unconditionally and irrevocably waives the right to any claim for a time extension or for any monetary compensation in addition to the Price and other compensation specified in this Agreement, except in accordance with this Section 11. To the extent that any other provision of this Agreement expressly provides for a Change Order to be issued, such provision is incorporated into and subject to this Section 11.

11.1 Circumstances Under Which Change Orders May Be Issued

11.1.1 Definition of and Requirements Relating to Change Orders

The term "Change Order" shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 11. A Change Order shall not be effective for any purpose unless executed by TxDOT. Change Orders may be issued for the following purposes (or combination thereof):

- (a) to modify the Specification;
- (b) to revise the Delivery Deadline;
- (c) to revise the Price;
- (d) to revise other terms and conditions of the Contract Documents.

Upon TxDOT's approval of the matters set forth in the Change Order form (whether it is initiated by TxDOT or requested by Fabricator), TxDOT shall sign such Change Order form indicating approval thereof. A Change Order may, at the sole discretion of TxDOT, direct Fabricator to proceed with the Work with the amount of any adjustment of the Delivery Deadline or Price to be determined in the future. All additions, deductions or changes to the Work as directed by Change Orders shall be executed under the conditions of the original Contract Documents.

11.1.2 Right of TxDOT to Issue Change Orders

TxDOT may, at any time and from time to time, without notice to any Surety, authorize and/or require changes in the Work and to the Contract Documents pursuant to a Change Order, including without limitation, requiring the acceleration or delay of the Delivery Deadline and/or increasing or decreasing the number of toll booth units under the Work. For the purpose of this Section 11.1.2, any direction to perform work shall be considered within the general scope of the Agreement if it is related to the Work; any direction to delete or modify Work shall be considered within the general scope unless as a result the Agreement would no longer be considered a contract for the Work of the nature described in the RFP. The terms and conditions pursuant to which TxDOT may issue Change Orders shall be as provided in Exhibit H.

11.1.3 Fabricator Requested Change Orders

11.1.3.1 Fabricator may request a Change Order to extend the Delivery Deadline only for delays directly attributable to Force Majeure Events, or TxDOT-Caused Delays which change the date of the Delivery Deadline. Fabricator may request a Change Order to increase the Price only for additional costs directly attributable to additional Work resulting from TxDOT-Directed Changes and TxDOT-Caused Delays for which TxDOT has not submitted a Change Order; Fabricator's entitlement to a Change Order for eligible changes is subject to the restrictions and limitations contained in this Section 11 and furthermore is subject to Fabricator's compliance with all notification and other requirements set forth in Exhibit H.

11.1.4 Performance of Disputed Work

If TxDOT refuses to issue a Change Order based on Fabricator's request, Fabricator shall nevertheless perform all work as specified by Directive Letter, and shall have the right to submit the issue to dispute resolution pursuant to Section 16. Fabricator shall maintain and deliver to TxDOT, upon request, contemporaneous records, meeting the requirements of Section 11.1.5, for all work performed which Fabricator believes constitutes extra work (including non-construction work), until all Disputes regarding entitlement or cost of such work are resolved.

11.1.5 Change Order Records

Fabricator shall maintain its records in such a manner as to provide a clear distinction between the direct costs of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Initial Order Price and the costs of other

operations. Fabricator shall contemporaneously collect, record in writing, segregate and preserve (a) separate daily occurrence logs, together with all other data necessary to determine the costs of all Work which is the subject of a Change Order or a requested Change Order, specifically including costs associated with design Work, and (b) all data necessary to show the actual impact (if any) of the change on each Critical Path with respect to all Work which is the subject of a Change Order or a proposed Change Order, if the impact on the Project Schedule is in dispute. Such data shall be provided to any dispute resolvers, TxDOT and its authorized representatives as directed by TxDOT, on forms approved by TxDOT. The cost of furnishing such reports is included in Fabricator's predetermined overhead and profit markups.

11.2 Matters Not Eligible for Change Orders and Waiver

Fabricator acknowledges and agrees that no increase in the Price or extension of the Delivery Deadline is available except in circumstances expressly provided for herein, that such price increase and time extension shall be available only as provided in this Section 11 and that Fabricator shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Fabricator's exclusive responsibility include the following:

11.2.1 Errors in the Final Design Documents (including Errors therein traceable to Errors in the Plans, subject only to the right to a Change Order to the extent permitted by Section 11;

11.2.2 Any design changes requested by TxDOT as part of the process of approving the Final Design Documents for consistency with the requirements of the Contract Documents;

11.2.3 Defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless arising from causes which otherwise give rise to a right to a Change Order);

11.2.4 Action or inaction of Fabricator's employees or Subcontractors (unless arising from causes which otherwise give rise to a right to a Change Order);

11.2.5 Untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents, except to the extent resulting from a Force Majeure Event;

11.2.6 Any costs covered by insurance proceeds received by (or on behalf of) Fabricator;

11.2.7 Correction of Nonconforming Work and review and acceptance thereof by TxDOT (including rejected design submittals);

11.2.8 Failure by any Fabricator-Related Entity to comply with the requirements of the Contract Documents;

11.2.9 Any situations (other than Force Majeure Events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Agreement or arise out of the nature of the Work; and

11.2.10 All other events beyond the control of TxDOT for which TxDOT has not expressly agreed to assume liability hereunder.

Fabricator hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by Fabricator of responsibility for such risks, and the consequences and costs and delays resulting therefrom, is reasonable under the circumstances of the Agreement and that contingencies included in the Proposal price in Fabricator's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

FABRICATOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY, SUSPENSION OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, SUSPENSION OR ACCELERATION) FOR WHICH FABRICATOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT FABRICATOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

11.3 No Release or Waiver

11.3.1 No extension of time granted hereunder shall release Fabricator's Surety from its obligations. Work shall continue and be carried on in accordance with all the provisions of the Agreement and the Agreement shall be and shall remain in full force and effect during the continuance and until Final Acceptance unless formally suspended or terminated by TxDOT in accordance with the terms hereof. Permitting Fabricator to finish the Work or any part thereof after the Delivery Deadline, or the making of payments to Fabricator after such date, shall not constitute a waiver on the part of TxDOT of any rights under the Agreement.

11.3.2 Neither the grant of an extension of time beyond the date fixed for the completion of any part of the Work, nor the performance and acceptance of any part of the Work or materials specified by the Agreement after the Delivery Deadline, shall be deemed to be a waiver by TxDOT of its right to terminate the Agreement for abandonment or failure to complete within the time specified (as it may have been extended) or to impose and deduct damages as may be provided.

11.3.3 No course of conduct or dealings between the parties nor express or implied acceptance of alterations or additions to the Work, and no claim that TxDOT has been unjustly enriched shall be the basis for any claim, request for additional

compensation or extension of a Delivery Deadline. Further, Fabricator shall undertake, at its risk, work included in any request, order or other authorization issued by a person in excess of that person's authority as provided herein, or included in any oral request. Fabricator shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, TxDOT may require Fabricator to remove or otherwise undo any such work, at Fabricator's sole cost.

Section 12 **Termination for Convenience**

12.1 Termination

TxDOT may terminate the Agreement and the performance of the Work by Fabricator in whole or, from time to time, in part, if TxDOT determines, in its sole discretion, that a termination is in TxDOT's best interest. TxDOT shall terminate by delivering to Fabricator a written Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date. Termination (or partial termination) of the Agreement shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

12.2 Fabricator's Responsibilities After Receipt of Notice of Termination

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, and except as otherwise directed by TxDOT, Fabricator shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 12:

12.2.1 Stop Work as specified in the notice.

12.2.2 Notify all affected Subcontractors that the Agreement is being terminated and that their Subcontracts (including orders for materials, services or facilities) are not to be further performed unless otherwise authorized in writing by TxDOT.

12.2.3 Place no further Subcontracts (including orders for materials, services or facilities), except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.

12.2.4 Unless instructed otherwise by TxDOT, terminate all Subcontracts to the extent they relate to the Work terminated.

12.2.5 Assign to TxDOT in the manner, at the times, and to the extent directed by TxDOT, all of the right, title, and interest of Fabricator under the Subcontracts so terminated, in which case TxDOT will have the right, in its sole discretion, to accept performance, settle or pay any termination settlement proposal arising out of the termination of such Subcontract.

12.2.6 Subject to the prior written approval of TxDOT, settle all outstanding liabilities and all termination settlement proposals arising from termination of Subcontracts.

12.2.7 No later than 60 days from the effective date of termination, unless extended in writing by TxDOT upon written request of Fabricator within this 60-day period, provide TxDOT with an inventory list of all materials previously produced, purchased or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to TxDOT, and such other information as TxDOT may request; and transfer title and deliver to TxDOT through bills of sale or other documents of title, as directed by TxDOT, (a) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (b) the Final Design Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property that would have been required to be furnished to TxDOT if the Work had been completed.

12.2.8 Complete performance in accordance with the Contract Documents of all Work not terminated.

12.2.9 As authorized by TxDOT in writing, use its best efforts to sell at reasonable prices any property of the types referred to in Section 12.2.7; provided, however, that Fabricator (a) is not required to extend credit to any purchaser, and (b) may acquire the property under the conditions prescribed and at prices approved by TxDOT. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by TxDOT under the Contract Documents or paid in any other manner directed by TxDOT.

12.2.10 Take other actions directed by TxDOT.

12.3 Settlement Proposal

After receipt of a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, Fabricator shall promptly submit but no later than 90 days from the effective date of termination a final termination settlement proposal to TxDOT in the form and with the certification prescribed by TxDOT.

Fabricator and TxDOT may agree, as provided in Section 12.4, upon the whole or any part of the amount or amounts to be paid to Fabricator by reason of the total or partial termination of Work for convenience pursuant to this Section 12. Such negotiated settlement may include a reasonable allowance for profit solely on Work which has been completed as of the termination date. Such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Price as reduced by the amount of payments otherwise made and the Price of Work not terminated. Upon determination of the settlement amount the Agreement will be amended accordingly,

and Fabricator will be paid the agreed amount as described in this Section 12. Nothing in Section 12.4, prescribing the amount to be paid to Fabricator in the event that Fabricator and TxDOT fail to agree upon the whole amount to be paid to Fabricator by reason of the termination of Work pursuant to this Section 12 shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to Fabricator pursuant to this Section 12. TxDOT's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve Fabricator from its obligations with respect thereto, including Warranties, or affect Fabricator's rights under the Performance Bond and/or Payment Bond as to such completed or non-terminated Work.

12.4 No Agreement as to Amount of Termination Settlement

If Fabricator and TxDOT fail to agree upon the whole amount to be paid Fabricator by reason of the termination of Work for convenience pursuant to this Section 14, the amount payable (exclusive of interest charges) shall be determined by TxDOT in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Section 12.3:

12.4.1 TxDOT will pay Fabricator the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience:

12.4.1.1 Fabricator's actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted herein, for all Work performed, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to TxDOT's satisfaction. In determining the reasonable cost, deductions will be made for the cost of materials to be retained by Fabricator, amounts realized by the sale of materials, and for other appropriate credits against the cost of the Work. Deductions will also be made, when the contract is terminated as the result of a Force Majeure event, for the cost of materials damaged by the "occurrence." When, in the opinion of TxDOT's designated representative, the cost of a contract item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost shall be disallowed.

12.4.1.2 A sum, as profit on the amounts specified in Section 12.4.1.1 above, determined by TxDOT to be fair and reasonable, but in no event to exceed 4% of the amount determined under Section 12.4.1.1; however, if it appears that Fabricator would have sustained a loss on the entire contract had it been completed, TxDOT shall allow no profit under this Section 12.4.1.2 and shall reduce the settlement to reflect the indicated rate of loss.;

12.4.1.3 The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 12.2.6, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under the Agreement, which amounts shall be included in the cost on account of which payment is made under Section 12.4.1.1 above;

12.4.1.4 The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Agreement, including the reasonable cost to Fabricator of handling material returned to the vendor, delivered to TxDOT or otherwise disposed of as directed by TxDOT, and including a reasonable allowance for Fabricator's administrative costs in determining the amount payable due to termination of the Agreement.

12.4.2 Fabricator acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 12.4.1) plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Agreement. The total amount to be paid to Fabricator, exclusive of costs described in Sections 12.4.1.3 and 12.4.1.4, may not exceed the total Price less the amount of payments previously made. Furthermore, in the event that any refund is payable with respect to insurance or bond premiums, deposits or other items which were previously passed through to TxDOT by Fabricator, such refund shall be paid directly to TxDOT or otherwise credited to TxDOT. Except for normal spoilage, and except to the extent that TxDOT will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Fabricator under Section 12.4.1, the fair value, as determined by TxDOT, of equipment, machinery, materials and property which is destroyed, lost, stolen, or damaged so as to become undeliverable to TxDOT, or sold pursuant to Section 12.2.9. Upon determination of the amount of the termination payment, the Agreement shall be amended to reflect the agreed termination payment, Fabricator shall be paid the agreed amount, and the Price shall be reduced to reflect the reduced scope of Work.

12.4.3 If a termination hereunder is partial, Fabricator may file a proposal with TxDOT for an equitable adjustment of the price for the continued portion of the Agreement. Any proposal by the Fabricator for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the TxDOT. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to the Agreement.

12.5 Reduction in Amount of Claim

The amount otherwise due Fabricator under this Section 12 shall be reduced by (a) the amount of any claim which TxDOT may have against any Fabricator-Related Entity in connection with the Agreement, (b) the agreed price for, or the proceeds of

sale, of property, materials, supplies or other things acquired by Fabricator or sold, pursuant to the provisions of this Section 12, and not otherwise recovered by or credited to TxDOT, and (c) amounts that TxDOT deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Work.

12.6 Subcontracts

Provisions shall be included in each Subcontract (at all tiers) regarding terminations for convenience, allowing such terminations to be passed through to the Subcontractors and establishing terms and conditions relating thereto, including procedures for determining the amount payable to the Subcontractor upon a termination, consistent with this Section 12.

12.7 No Consequential Damages

Under no circumstances shall Fabricator be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 12. The payment to Fabricator determined in accordance with this Section 12 constitutes Fabricator's exclusive remedy for a termination hereunder.

12.8 No Waiver

Anything contained in the Agreement to the contrary notwithstanding, a termination under this Section 12 shall not waive any right or claim to damages which TxDOT may have and TxDOT may pursue any cause of action which it may have by law, in equity or under the Agreement.

12.9 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 12 shall be a dispute to be resolved in accordance with Section 16.

12.10 Allowability of Costs

All costs claimed by Fabricator under this Section 12 shall be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

Section 13

Default

13.1 Default of Fabricator

13.1.1 Events and Conditions Constituting Default

Fabricator shall be in default under the Agreement upon the occurrence of any one or more of the following events or conditions:

13.1.1.1 Fabricator fails to perform the Work in accordance with the Contract Documents, including conforming to applicable schedules and standards set forth therein in design and fabrication of the toll booths, or refuses to remove and replace rejected materials or Nonconforming Work or unacceptable Work; or

13.1.1.2 Fabricator fails to maintain the insurance and bonds required hereunder; or

13.1.1.3 Fabricator attempts or purports to assign or transfer the Contract Documents or any right or interest herein, except as expressly permitted under the Agreement; or

13.1.1.4 Fabricator fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable Governmental Rules, or shall have failed to comply with any Governmental Rule or failed reasonably to comply with the instructions of TxDOT consistent with the Contract Documents; or

13.1.1.5 Fabricator breaches any other agreement, representation or warranty contained in the Contract Documents; or

13.1.1.6 Any final judgment is issued holding Fabricator liable for an amount in excess of \$100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false claims act; or

13.1.1.7 Any representation or warranty made by Fabricator in the Contract Documents or any certificate, schedule, instrument or other document delivered by Fabricator pursuant to the Contract Documents shall have been false or materially misleading when made; or

13.1.1.8 Insolvency of Fabricator.

13.1.2 Notice and Opportunity to Cure

Fabricator and Surety shall be entitled to 15 days written notice and opportunity to cure any breach before an Event of Default is declared, provided that no such notice and opportunity to cure is required for any breach which by its nature cannot be cured. Failure to provide notice to Surety shall not preclude TxDOT from exercising its remedies against Fabricator. If a breach is capable of cure but, by its nature, cannot be cured within 15 days, as determined by TxDOT, such additional period of time shall be allowed as may be reasonably necessary to cure the breach so long as Fabricator commences such cure within such 15-day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event shall such cure period exceed 60 days in total. Fabricator hereby acknowledges and agrees that the event described in Section 13.1.1.8 is not curable. Notwithstanding the foregoing, TxDOT may, without notice and without awaiting lapse of the period to cure any default, in the event of existence of a condition on or affecting the Work which TxDOT believes poses an immediate and imminent danger to public health or safety,

rectify the dangerous condition at Fabricator's cost, and so long as TxDOT undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose TxDOT to any liability to Fabricator and shall not entitle Fabricator to any other remedy, it being acknowledged that TxDOT has a paramount public interest in providing and maintaining safe public use of and access to the applicable Project Site(s) where the Work has been installed. TxDOT's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

13.2 Remedies

13.2.1 If any breach described in Section 13.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 13.1.2, TxDOT may declare that an "Event of Default" has occurred and notify Fabricator to discontinue the Work. The declaration of an Event of Default shall be in writing and given to Fabricator and Surety. In addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Agreement, the Performance Bond, if an Event of Default shall occur, then TxDOT shall have the following rights without further notice and without waiving or releasing Fabricator from any obligations and Fabricator shall have the following obligations (as applicable):

13.2.1.1 Fabricator shall deliver to TxDOT possession of any or all Final Design Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, information, schedules, samples, shop drawings, electronic files and other documents and facilities related to the Work that TxDOT deems necessary for completion of the Work;

13.2.1.2 Fabricator shall confirm the assignment to TxDOT of the Subcontracts requested by TxDOT and Fabricator shall terminate, at its sole cost, all other Subcontracts;

13.2.1.3 TxDOT may deduct from any amounts payable by TxDOT to Fabricator such amounts payable by Fabricator to TxDOT, including reimbursements owing, Liquidated Damages or other damages that TxDOT has determined may be payable to TxDOT under the Contract Documents;

13.2.1.4 TxDOT shall have the right, but not the obligation, to pay such amount and/or perform such act as may then be required;

13.2.1.5 TxDOT may direct the Surety to complete the Agreement or may enter into an agreement for the completion of the Agreement according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Agreement, including completion of the Work by TxDOT; and/or

13.2.1.6 If TxDOT exercises any right to perform any obligations of Fabricator, in the exercise of such right TxDOT may, but is not obligated to, among

other things: (i) perform or attempt to perform, or cause to be performed, such work; (ii) spend such sums as TxDOT deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing such work; (iii) execute all applications, certificates and other documents as may be required for completing the work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

13.2.2 If an Event of Default shall have occurred, Fabricator, Surety shall be jointly and severally liable to TxDOT (in addition to any other damages under the Contract Documents except for those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by TxDOT or any party acting on TxDOT's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work, and increased financing costs). Promptly following the Final Acceptance Date or the date on which TxDOT otherwise determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and TxDOT shall notify Fabricator, its Surety in writing of the amount, if any, that Fabricator, its Surety shall pay TxDOT or TxDOT shall pay Fabricator or its Surety with respect thereto. All costs and charges incurred by TxDOT, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due Fabricator or its Surety. If such expense exceeds the sum which would have been payable under the Agreement, then Fabricator and its Surety(ies) shall be liable and shall pay to TxDOT the amount of such excess. If the Surety fails to pay such amount immediately upon TxDOT's demand, then TxDOT shall be entitled to collect interest from the Surety on the amounts TxDOT is required to pay in excess of the balance of the Price. The interest rate which the Surety shall pay shall be the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules. The interest rate shall accrue on all amounts TxDOT has had to pay excess of the remaining balance of the Price from the date of TxDOT payment.

13.2.3 Fabricator acknowledges that if a default under Section 13.1.1.8 occurs, such event could impair or frustrate Fabricator's performance of the Work. Accordingly, Fabricator agrees that upon the occurrence of any such event, TxDOT shall be entitled to request of Fabricator, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten days of delivery of the request shall entitle TxDOT to terminate the Agreement and to the accompanying rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, TxDOT shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be credited against and deducted from TxDOT's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this Agreement and the Performance Bond.

13.2.4 In lieu of the provisions of this Section 13.2 for terminating the Agreement and completing the Work, TxDOT may pay Fabricator for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by this Agreement. No claim under this provision will be allowed for prospective profits on, or any other compensation relating to, Work uncompleted by Fabricator.

13.2.5 In the event that the Agreement is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 14.

13.2.6 The exercise or beginning of the exercise by TxDOT of any one or more rights or remedies under this Section 13.2 shall not preclude the simultaneous or later exercise by TxDOT of any or all other such rights or remedies, each of which shall be cumulative.

13.2.7 In the event TxDOT suffers damages as a result of Fabricator's breach or failure to perform an obligation under the Contract Documents, then TxDOT shall be entitled to recovery of such damages from Fabricator regardless of whether the breach or failure that gives rise to the damages ripens into an Event of Default.

13.2.8 Fabricator and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by Fabricator hereunder or by TxDOT's declaration of an Event of Default, or by actions taken by TxDOT under this Section 13.2.

13.2.9 In the event of TxDOT's acceptance of any Nonconforming Work pursuant to the terms of the Agreement, TxDOT shall be entitled to reimbursement as provided herein.

Section 14

LIQUIDATED DAMAGES AND LIMITATION OF LIABILITY

Fabricator understands and agrees that if Fabricator fails to complete the Work in accordance with the Contract Documents, TxDOT will suffer substantial Losses. Fabricator agrees that it shall be liable for all such Losses. Fabricator and TxDOT have agreed to require payment of Liquidated Damages with respect to certain types of Losses. Fabricator acknowledges and agrees that the Liquidated Damages are intended to compensate TxDOT solely for Fabricator's failure to meet the deadlines set forth in Section 4.2 and shall not excuse Fabricator from liability from any other breach of requirements of the Contract Documents, including any failure of the Work to conform to applicable requirements. Fabricator shall not be liable for actual damages in addition to the Liquidated Damages for Fabricator's failure to meet the deadlines set forth in Section 4.2. The fact that TxDOT has agreed to accept Liquidated Damages as compensation for its damages associated with any delay in meeting the Delivery Deadline or Final Acceptance shall not preclude TxDOT from exercising its other rights and remedies respecting the delay set forth in Section 13.2 other than the right to collect

other damages due to the delay, except that TxDOT agrees not to exercise such other rights and remedies respecting the delay so long as (a) the Fabricator demonstrates that it is capable of meeting such Delivery Deadline within 120 days after the Delivery Deadline and (b) Fabricator diligently performs the Work in accordance with said schedule.

14.1 Amount of Liquidated Damages

Fabricator acknowledges and agrees that because of the unique nature of the Work, the fact that the Work is an essential part of the tollway system, and the fact that inconvenience to the traveling public will be one of the significant impacts of any failure by Fabricator to achieve Delivery of all the toll booths and Final Acceptance by the applicable deadline, it is impracticable and extremely difficult to ascertain and determine the actual Losses which would accrue to TxDOT and the public in such event. Therefore, Fabricator shall pay TxDOT a liquidated amount (the "Liquidated Damages") as deemed compensation to TxDOT for such Losses, in the following amounts:

14.1.1 \$425.00 per unit for each day after the applicable Delivery Deadline for the first 60 Days after the Delivery Deadline; and

14.1.2 For each Day after the 60 Day period following the applicable Delivery Deadline, \$625.00 per unit per day.

14.2 Reasonableness of Liquidated Damages

Fabricator acknowledges and agrees that the foregoing damages have been set based on an evaluation by TxDOT of damages to TxDOT caused by late completion. Fabricator and TxDOT agree that the amount of such damages are impossible to ascertain as of the date of execution hereof and the parties have agreed to such Liquidated Damages in order to fix Fabricator's costs and to avoid later disputes over which items are properly chargeable to Fabricator. It is understood and agreed by Fabricator that any Liquidated Damages payable in accordance with this Section 14 are in the nature of liquidated damages and not a penalty and that such sums are reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of the proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Fabricator further acknowledges and agrees that Liquidated Damages may be owing even though no Event of Default has occurred.

14.3 Payment; Offset; Reduction; Waiver

14.3.1 Liquidated Damages shall be payable by Fabricator to TxDOT within ten days after Fabricator's receipt of an invoice therefor from TxDOT. Interest on such amounts shall accrue at the lesser of (i) 12% per annum or (ii) the maximum rate allowable under applicable law following the expiration of such ten-day period.

14.3.2 TxDOT shall have the right to deduct any amount owed by Fabricator to TxDOT hereunder from any amounts owed by TxDOT to Fabricator.

14.3.3 Permitting or requiring Fabricator to deliver the Work or any part thereof after the Delivery Deadline, shall not act as a waiver of TxDOT's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to TxDOT.

Section 15 **Indemnification**

15.1 Indemnifications by Fabricator

15.1.1 Subject to Section 15.1.3, Fabricator shall release, defend, indemnify and hold harmless TxDOT, the members of the Commission and their successors and assigns and their respective officers, directors, agents and employees (collectively referred to as the "Indemnified Parties") from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, costs, penalties, fines, damages, losses, liabilities and response costs, including any injury to or death of persons or damage to or loss of property, and including penalties, fines, attorneys', accountants' and expert witness fees and costs incurred in connection with the enforcement of this indemnity, arising out of, relating to or resulting from:

15.1.1.1 The breach or alleged breach of the Agreement by any Fabricator-Related Entity; and/or

15.1.1.2 Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work; provided that this indemnity shall not apply to any infringement resulting from TxDOT's failure to comply with specific written instructions regarding use provided to TxDOT by Fabricator; and/or

15.1.1.3 The actual or alleged act, error, omission or misconduct of any Fabricator-Related Entity in or associated with performance of the Work; and/or

15.1.1.4 Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Fabricator-Related Entity with respect to any payment for the Work made to or earned by any Fabricator-Related Entity; and/or

15.1.1.5 Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that TxDOT is not in default in payments owing to Fabricator with respect to such Work.

15.1.2 Subject to Section 15.1.3, Fabricator shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, costs, penalties, fines, damages, losses, liabilities and response costs, including any injury to or death of persons or damage to or loss of property, and including penalties, fines,

attorneys', accountants' and expert witness fees and costs, arising out of, relating to or resulting from errors, omissions, inconsistencies or other defects in the design or construction, regardless of whether such errors, omissions, inconsistencies or defects were also included in the Plans or referenced documents. Fabricator agrees that, because the concepts in the Plans are subject to review and modification by Fabricator, such documents shall not be deemed "prescriptive design specifications" or "prescriptive fabrication specifications" as such terms are used in Section 15.1.3.2 below.

15.1.3 Subject to the releases and disclaimers herein, Fabricator's indemnity obligation shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by:

15.1.3.1 The negligence or willful misconduct of such Indemnified Party or its agents, servants or independent Fabricators who are directly responsible to such Indemnified Party.

15.1.3.2 Any material defect inherent in prescriptive design or prescriptive construction specifications included in the Contract Documents, provided Fabricator complied with such specifications and did not actually know, or would not reasonably have known, while exercising reasonable diligence, that it was deficient or, if Fabricator actually knew of the deficiency, unsuccessfully sought TxDOT's waiver of or approval of a Deviation from such standard; or

15.1.3.3 TxDOT's material breach of any of its obligations under the Contract Documents.

15.1.4 In claims by an employee of Fabricator, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 15.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Fabricator or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

15.1.5 Fabricator hereby acknowledges and agrees that it is Fabricator's obligation to cause the Work to be designed and to fabricate the Work in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on Fabricator's performance of such obligation.

15.2 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge, or reduce other rights or obligations which would otherwise exist in favor of a party indemnified hereunder.

15.3 Intent of Indemnity for Breach of Agreement

The requirement to provide an indemnity for breach of contract set forth in Section 15.1.1 is intended to provide protection to TxDOT with respect to third party claims associated with such breach. It is not intended to provide TxDOT with an alternative cause of action for damages incurred directly by TxDOT with respect to such breach.

15.4 No Relief from Responsibility

No rights of TxDOT described in Section 15.1.1 above, no exercise or failure to exercise such rights, and no certificates or statements by TxDOT regarding completion or acceptance, shall:

15.4.1 Relieve Fabricator of its responsibility for the selection and the competent performance of all Fabricator-Related Entities;

15.4.2 Relieve Fabricator of any of its obligations or liabilities under the Contract Documents;

15.4.3 Be deemed or construed to waive any of TxDOT's rights and remedies under the Contract Documents, applicable law or in equity; or

15.4.4 Be deemed or construed as any kind of representation or warranty, express or implied, by TxDOT.

15.5 Right to Rely

Notwithstanding the provisions above, (a) Fabricator shall be entitled to rely on specific written Deviations TxDOT gives under this Agreement, (b) TxDOT is not relieved from any liability arising out of a material misrepresentation under any written statement TxDOT knowingly and intentionally delivers, and (c) TxDOT is not relieved from its obligations under the Contract Documents.

Section 16

Partnering and Dispute Resolution

16.1 Disputes Governed by this Section; Demands and Disputes; Priorities

Disputes hereunder shall be resolved pursuant to Texas Transportation Code Section 201.112 and the dispute resolution procedures established thereunder, as the same may be amended from time to time. The dispute resolution procedures are set forth in Exhibit I attached to this Agreement. Section 16 shall not apply to (i) claims that are not actionable against TxDOT by Fabricator on its own behalf or on behalf of any of its Subcontractors in accordance with Section 16.2, (ii) claims arising solely in tort; (iii) claims for indemnity under Section 15; (iv) claims for injunctive relief; or (v) claims against insurance companies.)

16.2 Dispute Resolution: Additional Requirements for Subcontractor Demands

16.2.1 For purposes of this Section 16, a “Subcontractor Dispute” shall include any Dispute by a Subcontractor, including also any pass-through claims by a lower tier Subcontractor, against Fabricator that is actionable by Fabricator against TxDOT and arises from Work, materials or other services provided or to be provided under the Contract Documents. If Fabricator determines to pursue a Dispute against TxDOT that includes a Subcontractor Dispute, the following additional conditions shall apply:

(a) Fabricator shall identify clearly in all submissions pursuant to this Section 16, that portion of the Dispute that involves a Subcontractor Dispute.

(b) Failure of Fabricator to assert a Subcontractor Dispute on behalf of any Subcontractor at the time of submission of a related Demand by Fabricator, as provided hereunder, shall constitute a release and discharge of TxDOT by Fabricator on account of, and with respect to, such Subcontractor Dispute.

(c) Fabricator shall require in all Subcontracts that all Subcontractors of any tier (a) agree to submit Subcontractor Disputes to Fabricator in a proper form and in sufficient time to allow processing by Fabricator in accordance with this Section 16; (b) agree to be bound by the terms of this Section 16 to the extent applicable to Subcontractor Disputes; (c) agree that, to the extent a Subcontractor Dispute is involved, completion of all steps required under this Section 16 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by law, including institution of a lawsuit against Fabricator; (d) agree that any Subcontractor Dispute brought against a bonding company, that also is actionable against TxDOT through Fabricator, shall be stayed until completion of all steps required under this subsection; and (e) agree that the existence of a dispute resolution process for Disputes involving Subcontractor Disputes shall not be deemed to create any claim, right or cause of action by any Subcontractor against TxDOT. The Subcontractors shall, at all times, have rights and remedies only against Fabricator.

16.2.2 Notwithstanding the foregoing, this Section 16 shall not apply to (a) any Subcontractor Dispute between the Subcontractor(s) and Fabricator that is not actionable by Fabricator against TxDOT, (b) any Subcontractor Dispute based on remedies expressly created by statute, (c) any Subcontractor Dispute that is covered by insurance, or (d) any Subcontractor Dispute that is actionable only against a bonding company.

16.3 Mediation or Other Alternative Dispute Resolution

Fabricator and TxDOT, by mutual agreement, may at any time refer the Dispute to mediation or any other form of alternative dispute resolution that is acceptable to all parties to the Dispute. Fabricator and TxDOT shall share equally the expenses of the mediator or other alternative dispute resolution process.

16.4 Subsequent Proceedings

16.4.1 Exclusive Jurisdiction and Venue

Fabricator agrees that the exclusive jurisdiction and venue for any legal action or proceeding, at law or in equity, arising out of or relating to the Contract Documents or the Project, shall be the Travis County District Court. Fabricator waives all objections it might have to the jurisdiction or venue of such court and hereby consents to such court's jurisdiction, regardless of Fabricator's residence or domicile, for any such action or proceeding.

16.4.2 Admissibility of Dispute Resolution Proceedings

The admissibility, in any administrative or judicial proceeding subsequent to this dispute resolution process, of the Parties' submittals and any TxDOT determinations shall be in the discretion of the appropriate administrative officer or the court in accordance with applicable rules of law.

16.5 Continuation of Work

At all times during this dispute resolution process or any subsequent administrative, arbitration or court proceeding, Fabricator and all Subcontractors shall proceed with the Project diligently, without delay, in accordance with this Agreement, and as directed by TxDOT. Fabricator acknowledges that it shall be solely responsible for any Project delay that results from its actions or inactions during the dispute resolution process, even if Fabricator's position in connection with the Dispute ultimately prevails. In addition, all Parties shall continue to comply with all provisions of the Contract Documents, the Governmental Approvals and applicable Governmental Rules.

16.6 Records Related to Dispute

Throughout the course of any Work that is the subject of any Demand or Dispute, Fabricator shall keep separate and complete records as required by Section 11.1.4.

These records shall be retained for a period of not less than five years from the date of resolution of the Dispute.

Section 17

Delivery and Acceptance

17.1 Delivery and Final Acceptance

17.1.1 Specific Requirements

Fabricator shall have completed Delivery of the Work for the Initial Order, and for each additional order when all of the following have occurred respectively with respect to the Initial Order and each additional order:

17.1.1.1 Fabricator has delivered the frames and toll booths comprising the Work in conformance with the Contract Documents;

17.1.1.2 Fabricator has ensured that all such Work has been performed in accordance with the requirements of the Contract Documents;

17.1.1.3 The Work may be installed as contemplated in the Final Design Documents; and

17.1.1.4 Fabricator has furnished to TxDOT a certification, in form and substance satisfactory to TxDOT, certifying conformity of the fabrication with the Final Design Documents.

17.1.2 Final Acceptance

17.1.2.1 Fabricator shall make itself available to be present on the dates, times and at the Project Sites specified by TxDOT to assist TxDOT with the installation of the Work. Within 20 Days of installation, TxDOT shall notify Fabricator of any Nonconforming Work, if any, which Fabricator shall immediately repair or otherwise cure, prior to TxDOT issuing written notice of Final Acceptance of the Work. Notwithstanding the foregoing, the occurrence of Final Acceptance shall not relieve Fabricator of any of its continuing obligations under the Contract Documents, including Warranty obligations, or constitute any assumption of liability by TxDOT.

Section 18

Documents and Records

18.1 Ownership and Use of Documents

All data, sketches, charts, calculations, plans, specifications, electronic files, correspondence and other documents created or collected under the terms of the Contract Documents shall be considered “works made for hire” for which TxDOT owns the copyright. Final Design Documents shall become TxDOT’s property upon preparation and delivery to TxDOT; and other documents prepared or obtained by Fabricator in connection with the performance of its obligations under the Agreement, including studies, manuals, as-built drawings, technical and other reports and the like, shall become the property of TxDOT upon Fabricator’s preparation or receipt thereof. Copies of all Final Design Documents shall be furnished to TxDOT upon preparation or receipt thereof by Fabricator. Fabricator shall maintain all other documents described in this Section in accordance with the requirements herein and shall deliver copies to TxDOT as required by the Contract Documents or upon request if not otherwise required to be delivered, with an indexed set delivered to TxDOT as a condition to Final Acceptance. Fabricator shall retain copies of all documents and records pertaining to the Agreement and the Work until one year after the expiration of the warranties.

18.2 Escrowed Proposal Documents

Prior to execution of this Agreement, Fabricator delivered into escrow one copy of all documentary information used in preparation of the Price (the “EPDs”). Upon execution of this Agreement, the EPDs shall be transferred from escrow and held in locked fireproof cabinet(s) supplied by Fabricator and located in TxDOT’s project office with the key held only by Fabricator. Concurrently with approval of each Change Order or amendment to any Contract Document, one copy of all documentary information used in preparation of the Change Order or amendment shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained until all of the following have occurred: (a) 180 days have elapsed from the later of Final Acceptance or termination of this Agreement, as applicable; (b) all disputes regarding the Work have been settled; and (c) Final Payment has been made and accepted.

18.2.1 Availability for Review

The EPDs shall be available during business hours for joint review by Fabricator, TxDOT and any dispute resolver in accordance with Section 16, in connection with approval of the Project Schedule, negotiation of Change Orders and resolution of Disputes under the Contract Documents, and also as described in Section 18.2.6. TxDOT shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue.

18.2.2 Proprietary Information

The EPDs are, and shall always remain, the property of Fabricator and shall be considered to be in Fabricator's possession, subject to TxDOT's right to review the EPDs as provided in this Section 18.2. Fabricator will have and control the keys to the filing cabinet containing the EPDs. TxDOT acknowledges that Fabricator may consider that the EPDs constitute trade secrets or proprietary information.

18.2.3 Representation

Fabricator represents and warrants that the EPDs constitute all documentary information used in the preparation of its Price. Fabricator agrees that no other price proposal preparation information will be considered in resolving Disputes. Fabricator further agrees that the EPDs are not part of the Contract Documents and that nothing in the EPDs shall change or modify any Contract Document.

18.2.4 Contents of EPDs

The EPDs shall, inter alia, clearly detail how each price included in the Proposal has been determined and shall show prices and price elements in sufficient detail as is adequate to enable TxDOT to understand how Fabricator calculated the Initial Order Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total price and individual components of that price were determined. The EPDs shall itemize the estimated costs of performing the required work separated into usual and customary items and cost categories and sub-items and cost categories to present a detailed estimate of costs, such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, Subcontract costs, plant and equipment, indirect costs, contingencies, mark-up, overhead and profit. The EPDs shall itemize the estimated annual costs of insurance premiums for each coverage required to be provided by Fabricator under Exhibit F. The EPDs shall include all assumptions, detailed quantity takeoffs, price reductions and discounts, rates of production and progress calculations, and quotes from Subcontractors used by Fabricator to arrive at the Initial Order Price, amendment price or Change Order price.

18.2.5 Form of EPDs

Except as otherwise provided in the RFDP, Fabricator shall submit the EPDs in such format as is used by Fabricator in connection with its Proposal. Fabricator represents and warrants that the EPDs provided with the Proposal were personally examined by an authorized officer of Fabricator prior to delivery, and that the EPDs meet the requirements of Section 18.2.4. Fabricator further represents and warrants that the EPDs provided in connection with quotations and Change Orders will be personally examined prior to delivery by an authorized officer of Fabricator, and that they shall meet the requirements of Section 18.2.4.

18.2.6 Review by TxDOT

TxDOT may at any time conduct a review of the EPDs to determine whether they are complete. If TxDOT determines that any data is missing from an EPD, Fabricator shall provide such data within three business days after delivery of TxDOT's request for such data. At that time of its submission to TxDOT, such data will be date stamped, labeled to identify it as supplementary EPD information and added to the EPD. Fabricator shall have no right to add documents to the EPDs except upon TxDOT's request. The EPDs associated with any Change Order or amendment to this Agreement shall be reviewed, organized and indexed in the same manner described in Section 6 of the RFP.

18.3 Subcontract Pricing Documents

Fabricator shall require each Major Subcontractor to submit to Fabricator a copy of all documentary information used in determining its Subcontract price (or the price for Subcontract Work included in any Change Order), immediately prior to executing the Subcontract and each change order and Subcontract amendment, to be held in the same manner as the EPDs and which shall be accessible by Fabricator and its successors and assigns (including TxDOT) and dispute resolvers, on terms substantially similar to those contained herein.

Section 19

Miscellaneous Provisions

19.1 Amendments

The Contract Documents may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

19.2 Waiver

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future disputes.

19.3 Independent Contractor

Fabricator is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with TxDOT other than that of Work Fabricator and independent contractor. In no event shall the relationship between TxDOT and Fabricator be construed as creating any relationship whatsoever between TxDOT and Fabricator's employees. Neither Fabricator nor any of its employees is or shall be deemed to be an employee of TxDOT. Except as otherwise specified in the Contract Documents, Fabricator has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that Fabricator or any Subcontractor hires to perform or assist in performing the Work.

19.4 Successors and Assigns

19.4.1 The Contract Documents shall be binding upon and inure to the benefit of TxDOT and Fabricator and their permitted successors, assigns and legal representatives.

19.4.2 Fabricator may not, without the prior written consent of TxDOT in its sole discretion, voluntarily or involuntarily assign, convey, transfer, pledge, mortgage or otherwise encumber its rights or interests under the Contract Documents.

19.5 Designation of Representatives; Cooperation with Representatives

19.5.1 TxDOT and Fabricator shall each designate in writing an individual or individuals who shall be authorized to make decisions and bind the parties on matters

relating to the Contract Documents. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 19.10.1. The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the fabrication of the Work and negotiate on behalf of each of the parties but who do not have authority to bind TxDOT or Fabricator.

19.5.2 Fabricator shall cooperate with TxDOT and all representatives of TxDOT designated as described above.

19.6 Survival

Fabricator's representations and warranties, the dispute resolution provisions contained in Section 16, the indemnifications and releases contained in Section 15, and all other provisions which by their inherent character should survive termination of the Agreement and/or Final Acceptance, shall survive the termination of the Agreement and the Final Acceptance Date.

19.7 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any other third party beneficiary hereunder or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 19.7, the duties, obligations and responsibilities of the parties to the Contract Documents with respect to third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between TxDOT and a Subcontractor or any Person other than Fabricator.

19.8 Tort Liability; Personal Liability of TxDOT Employees

TxDOT's authorized representatives are acting solely as agents and representatives of TxDOT when carrying out the provisions of or exercising the power or authority granted to them under the Agreement. They shall not be liable either personally or as employees of TxDOT for actions in their ordinary course of employment.

No agent, consultant, officer or authorized employee of TxDOT nor any member of the Commission, shall be personally responsible for any liability arising under the Agreement.

The Parties agree to provide to each other's authorized representative written notice of any claim which such Party may receive from any third party relating in any way to the matters addressed in this Agreement, and shall otherwise provide notice in such form and within such period as is required by law.

In no event shall TxDOT be liable for any injury, damage or death caused by the actions, omissions, negligence, willful misconduct, or breach of applicable Governmental Rules or contract by any Fabricator-Related Entity. Fabricator expressly acknowledges and agrees that TxDOT's rights in this Agreement to take any action with respect to the Work, including the right to review, comment on, disapprove and/or accept designs, plans, specifications and the like, are discretionary in nature and exist solely for the benefit and protection of TxDOT and do not create or impose upon TxDOT any standard or duty of care toward Fabricator or any other Person, all of which are hereby expressly disclaimed.

19.9 Governing Law

The Contract Documents shall be governed by and construed in accordance with the laws of the State of Texas.

19.10 Notices and Communications

19.10.1 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by telefacsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

Texas Department of Transportation
Attention: Timothy J. Weight, P.E.
1421 Wells Branch Parkway, Suite 107
Pflugerville, Texas 78660
telephone: (512) 225-1300
facsimile: (512) 225-1400
e-mail: tweight@dot.state.tx.us

All correspondence with Fabricator shall be sent to Fabricator's designated representative or as otherwise directed by Fabricator. The address for such communications shall be:

[name]
[address]
telephone/facsimile
e-mail

All communications to TxDOT shall be marked as regarding the Toll Booth Design and Fabrication Project and shall be delivered as directed by TxDOT's designated representative.

19.10.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other

Person making the delivery. Notwithstanding the foregoing, notices received after 5:00 p.m. shall be deemed received on the first business day following delivery.

19.10.3 Fabricator shall copy TxDOT on all written correspondence pertaining to the Work between Fabricator and any Person other than Fabricator's Subcontractors, consultants and attorneys.

19.11 Severability

If any clause, provision, section or part of the Agreement is ruled invalid under Section 16 or otherwise by a court having proper jurisdiction, then the parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Agreement, which shall be construed and enforced as if the Agreement did not contain such invalid or unenforceable clause, provision, section or part.

19.12 Headings

The captions of the sections of the Agreement are for convenience only and shall not be deemed part of the Agreement or considered in construing the Agreement.

19.13 Entire Agreement

The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

19.14 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Agreement has been executed as of _____
____, 2004.

Fabricator

By: _____

Name: _____

Title: _____

Date: _____, 2004

**TEXAS DEPARTMENT OF
TRANSPORTATION**

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

By: _____